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Damien Sexton

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. CR-07-0742 (EDL)
Plaintiff,)
vs.)
DAMIEN SEXTON,) DEFENDANT'S REPLY TO
Defendant.) GOVERNMENT'S OPPOSITION
) TO MOTION FOR DISCOVERY
)
) Date: April 1, 2008
) Time: 10:30 a.m.
) Dept.: Judge Elizabeth D. Laporte

INTRODUCTION

On March 11, 2008 defendant Damien Sexton filed a motion for discovery with this Court. On March 18, 2008 the government filed its opposition to the defendant's motion. By the foregoing, defendant replies to issues and arguments raised in the government's submission.

Defendant's Reply to Government's Opposition to Motion for Discovery, CR-07-0742(EDL).

DISCUSSION

1. Discovery Provided By the Government To Date

2 In its Opposition, the government confirmed that it has provided all documents received and all
3 reports generated in the course of this investigation to the defendant. The government also assured
4 the Court and the defendant that it has fulfilled its obligation to turn over all potentially
5 exculpatory material in its possession as mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and
6 its progeny. Based on these representations, the defendant understands that there is currently no
7 discoverable material in the possession of the government. Additionally, the government
8 recognized the continuing nature of its obligation to provide discovery to the defense.

9 2. The Defendant Withdraws the Portion of His Discovery Motion Seeking the Contact 10 Information for the Named Witnesses

11 Since the filing of defendant's motion the parties have agreed that witness contact information
12 for individuals interviewed in connection with this investigation may be provided to the defense
13 pursuant to a protective order. The protective order was signed by this Court on March 17, 2008,
14 and the government thereafter provided the information covered by this agreement. Therefore,
15 defendant Sexton respectfully withdraws that portion of his discovery motion seeking the contact
16 information of the witnesses named in the investigative reports previously provided in discovery.

17 3. Production of the Flight Manifest for United Airlines Flight 189

18 Finally, the defendant seeks disclosure of the flight manifest or other flight document and a
19 seating chart for United Airlines Flight 189, illuminating who was aboard this flight and which
20 passengers were seated near the defendant. This material is of central importance to this case
21 because many of persons, who can only be identified through the flight manifest and seating chart,
22 witnessed and/or took part in the events leading up the instant prosecution. For example, the
23 investigative reports indicate that approximately 5 persons tackled the defendant in the aisle of the
24 aircraft – but not all of these persons were interviewed by the authorities. Additionally, several of
25 the investigative reports state that persons seated in front or behind the defendant heard and reacted
26 to the events. The defendant respectfully requests that the government produce the flight manifest
27 and seating chart for United Airlines Flight 189.

1 to statements made by him – which may shed light on the alleged assault charged in Count Two,
2 but these persons were not interviewed, either. As argued by the defendant, the need for this
3 information is underscored by the fact that the passengers and crew who have been interviewed by
4 the government provided versions of these events which diverge sharply from one another.

5 The government responded, however, that neither the United States Attorney's Office nor the
6 investigating agencies involved in the case have this information in their possession. The
7 government then argued that it cannot be required to obtain information not in its actual
8 possession. The defendant acknowledges that this is the general rule, as set forth in *Sanchez v.*
9 *United States*, 50 F.3d 1448, 1453 (9th Cir. 1995), and cited by the government herein. We submit,
10 however, that a distinction must be drawn in a case such as this where the prosecuting agency is
11 working hand in glove with the possessor of relevant information. See *United States v. Diaz*, 2008
12 U.S. Dist. LEXIS 12171, *15 (N.D.Cal. 2008)(“Where, . . ., the federal prosecutors have worked
13 hand in glove with the police in bringing and investigating a case, it seems clear that the reasoning
14 of *Kyles* requires federal prosecutors ‘to learn of any favorable evidence known to *others acting in*
15 *the government’s behalf*,’ including local police acting on its behalf in the investigation.”); See
16 also *United States v. Ubiparipovic*, 2006 U.S. Dist. LEXIS 23645 (D. Ar. 2006).

17 In *Ubiparipovic* the district court considered a defendant’s request that the government be
18 directed to obtain the names and addresses of employees of an organization called the International
19 Organization of Migration (“IOM”). There, as here, the government asserted that such information
20 was not in its possession, and it could not be compelled to obtain it. The Court first found that
21 though the IOM is not a governmental agency of the United States, it was contracted to perform
22 tasks on behalf of the government related to asylum applications, and thus acted as an “agent” of
23 the government in performing such tasks. The Court next explained that whether information is in
24 the possession, custody or control of the government for purposes of Rule 16(a)(1)(E) turns on
25 “whether the United States Attorney had knowledge of and access to the documents.” See
26 *Ubiparipovic*, at *4. The Court continued:
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1 There is no dispute in this case that the United States Attorney has knowledge of the
2 existence of the requested information – the names and addresses of IOM’s
3 Belgrade employees. The unresolved question is whether the United States
4 Attorney has access to that information.

5 *Ibid.* In considering the question of governmental access, the Court acknowledged the
6 government’s claim that it had attempted to obtain the information from the organization but was
7 unsuccessful. The Court then held that if at a later proceeding, the defendant is able to make the
8 required materiality showing, the Court would issue an order directing the government to make a
9 more robust attempt to obtain this information. Finally, the Court stated that it will sign a
10 subpoena for the information submitted by the defense, explaining that “this second means of
11 discovery is appropriate given the uncertainty as to how best to obtain the information at issue.”

12 In the instant case the government can be said to be working hand in glove with United
13 Airlines. This is because the investigation of this case was initiated by a call made by the United
14 Airlines Captain Atala, and the ensuing investigation appears to have been based exclusively upon
15 the identification of witnesses supplied by United Airlines crew members. Eight months later the
16 government brought a federal criminal prosecution based on the accounts of the few select
17 individuals aboard this flight which the United Airlines crew members saw fit to identify to
18 investigators. The defendant cannot rightly be forced to proceed to trial based on the
19 government’s implicit assumption that the persons flagged by the authorities in this investigation
20 provide all the relevant information that exists surrounding the alleged assaults by the defendant,
21 despite the knowledge that there were other eyewitnesses and participants aboard that flight. The
22 government has apparently made no attempt to obtain this information, simply contending that it
23 should not have to. As in *Ubiparipovic* the government should not be shielded from this discovery
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1 obligation by blandly claiming that information pertaining to such percipient witnesses is out of its
2 hands.

3
4 Finally, the government suggests that the defendant has adequate recourse, without requiring
5 the government to seek out this information, because we can get a Rule 17(c) subpoena *duces*
6 *tecum*, which once authorized, would constitute a binding Court Order. As the Court is aware, we
7 have filed an application for the issuance of such a subpoena. We note, however, that our initial
8 concern that the airline would be less amenable to a request from the defendant than it would be to
9 a request from the government appears entirely justified. The airline has, in fact, refused to give us
10 the name or address of its custodian of records – but has stated that we can fax a request for this
11 preliminary information to United Airlines' legal department for consideration. Nonetheless,
12 should the Court issue such a subpoena, we will continue to make every effort to obtain the
13 information sought herein from United Airlines.

14 **CONCLUSION**

15 By the foregoing, Defendant Sexton respectfully asks the Court to order the government to
16 produce a flight manifest and seating chart, containing names and locations of potential witnesses.

17
18 Respectfully submitted,

19 Dated: March 21, 2008

20 /s/ William L. Osterhoudt
WILLIAM L. OSTERHOUDT
21 Attorney for Defendant

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 135 Belvedere Street, San Francisco, California 94117.

On the date set forth below, I caused to be served the document entitled:

DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSITION TO MOTION
FOR PRETRIAL DISCOVERY

on the party in this action as follows:

Allison Marston Danner
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, CA 94102
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X [BY ELECTRONIC SERVICE] Utilizing the ECF system of the United States District Court for the Northern District of California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: March 21, 2008

/s/ Christopher W. Choy
Christopher W. Choy